Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

ANA BOATWRIGHT,

Petitioner,

v.

ELLIOT D. RAY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), dictates a court in federal habeas proceedings employ a highly deferential standard in evaluating state court rulings. Put bluntly, the AEDPA requires federal courts to give state court decisions "the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

Did the Seventh Circuit exceed its authority under 28 U.S.C. § 2254(d) when it failed to defer to a state court's decision that out-of-court statements were not hearsay and determined that Elliot Ray's confrontation clause rights were violated by the admission of those statements?

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OPINIONS BELOW

The opinion of the court of appeals is reported as *Ray v. Boatwright*, 592 F.3d 793 (7th Cir. 2010) (A1-24). The opinions of the district court are unreported. The decision of the Wisconsin Court of Appeals is unreported (A30-38).

JURISDICTION

The court of appeals entered its decision and final judgment on January 21, 2010 (A13-24, A25). The court entered an amended decision on April 1, 2010 (A1-12). The court entered an order on April 1, 2010, denying the timely petition for rehearing, and an amended order denying the petition for rehearing on April 1, 2010 (A25-28). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which is codified at 28 U.S.C. § 2254, provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

A. Facts of the crime and trial.

In March 2000, a group of men, including Ray, decided to go out and shoot some other men with whom they had been arguing (A31). An eleven-year-old girl was killed as a result of the ensuing gunfire (A31). Ray was charged, *inter alia*, as a party to the crime of first-degree reckless homicide (A30).

When Ray was arrested and interviewed by the police, he denied any knowledge of the crime. Eventually, though, Ray told Detective Daniel Phillips that on the night before the girl was killed, Ray and his friends had gotten into a shoot-out with some other men (A34). Ray explained to Phillips that the day following the shoot-out, he and his friends decided that they would go after the men with whom they had been fighting (A31, 34). Ray explained that he grabbed a gun and went with his friends to shoot at the other group of men (A34). Ray stated, though, that as he was walking toward the eventual crime scene, he had a change of heart and turned around, abandoning the plan (A34).

At this point in the interview, Phillips told Ray that two of his friends had told him that Ray was with them at the crime scene. Upon hearing this, Ray told Phillips, "Those stupid niggers shouldn't be talking and they can't talk for me" (A 34). When Phillips then confronted Ray with

statements from his friends regarding what type of weapon Ray was carrying at the scene, Ray told Phillips, "Tell me which gun killed the girl and I'll tell you everything" (A34).

At trial, Ray argued that he had withdrawn from the plan to shoot at the rival group before any shots had been fired (A31-32). The State, however, presented Phillips's testimony regarding Ray's inculpatory statements that were made when he was confronted with his friends' allegations (A34-35). Phillips testified as follows:

> Ray was then confronted with numerous statements made by co-actors that they were present [at the] shooting on 29th Street and so was Ray.
>
> Ray then stated "those stupid niggers shouldn't be talking and they can't talk for me."
>
> When confronted with statements by Black (Miriam Myles, black male, 5/7/80) that Ray was shooting a nine-millimeter on 29th Street in a statement by Sylvester Townsend, black male, 9/20/73, that Ray had a .45-caliber pistol[,] Ray then said "tell me which gun killed the girls and I'll tell you everything."

> When told by detectives that this information could not be given to him at this time, Ray said he was afraid of "fucking himself" and Ray said he needed some time to think and then would talk to the detectives again.'

(A34-35). Ray did not object to this testimony. Ray was convicted of first-degree reckless homicide (A31).

B. Wisconsin state court decisions.

On direct appeal, Ray argued that his confrontation clause rights had been violated by the admission of Phillips' testimony (A30-38). Because there had been no objection to the testimony at trial, the court of appeals reviewed the claim for "plain error" (A32). The court found that Phillips' testimony did not contain extrajudicial statements admitted for their truth, but contained statements elicited to explain Ray's reaction to hearing those statements (A35). Because the testimony did not contain statements elicited for their truth, the testimony did not contain hearsay (A35). In the absence of a finding of hearsay, the court of appeals found there was no confrontation clause issue and affirmed Ray's conviction (A35). The Wisconsin Supreme Court denied Ray's petition for review.

Ray returned to state court and moved for collateral relief under Wis. Stat. § 974.06, this time

citing his appellate counsel's deficiency for not challenging counsel's performance with regard to Phillips' testimony. The court of appeals denied Ray relief, finding the confrontation clause issue had already been litigated and decided. The Wisconsin Supreme Court again denied Ray's petition for review.

Ray also filed a state petition for a writ of habeas corpus, which was denied.

C. Federal court proceedings.

In February 2007, Ray filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District, as well as a motion to stay proceedings while he returned to state court to exhaust some of his claims. The court granted Ray a stay. When Ray returned to court with his claims exhausted, the district court dismissed Ray's petition under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Court, which provides that a judge may summarily dismiss a petition when it "plainly appears from the face of the petition . . . that the petitioner is not entitled to relief." Nonetheless, the district court granted Ray a certificate of appealability on his confrontation clause claim.

The Seventh Circuit reversed the district court's order and remanded the case to the lower court to grant Ray the habeas relief he sought,

unless Boatwright (hereinafter, "the State") could demonstrate to the district court that the petition was untimely filed under 28 U.S.C. § 2244(d)(1)(A) (A13-24).[1] The court of appeals concluded that Phillips' testimony was hearsay and "was a clear violation of Ray's constitutional right of confrontation" (A19). The court of appeals found the Supreme Court case regarding hearsay on which the state court relied to be "distinguishable" from Ray's case (A19-20). The court then proceeded to find that the testimony did not fall under a recognized hearsay exception and was, therefore, inadmissible (A20-22). Finally, the court analyzed whether the admission of the testimony was "plain error" (A22-23). Finding that it was, the court reversed and remanded the case (A22-23).

The State filed a petition for rehearing and rehearing *en banc*. The State argued that the court of appeals failed to apply the AEDPA to Ray's claim and, instead, appeared to review the claim as if it were before the court on direct review. The State maintained that this appearance was amplified when the court reviewed the admission of the testimony for plain error, a rule of federal criminal procedure applied only on direct review from a federal judgment. *See* Fed. R. Crim. P. 52(b). The

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[1]The State was not afforded an opportunity to respond to Ray's habeas petition in the district court. Thus, the State raised its untimeliness argument for the first time on appeal.

court of appeals ordered Ray to file a response to the State's petition.

The Seventh Circuit then issued an amended decision (A1-12). The amended decision altered two parts of the original decision: (1) the amended decision declared, without citation, that "the hearsay violation is beyond dispute" (A5) and (2) the amended decision employs a harmless error analysis in substitution for the court's previously misplaced plain error analysis (A10). Finding the perceived constitutional violation was not harmless, the court reversed and remanded the case (A10, 12).

REASONS FOR GRANTING THE PETITION

This Court should grant this petition because the Seventh Circuit exceeded its authority under 28 U.S.C. § 2254(d) when it granted habeas corpus relief in this case. The Seventh Circuit's decision ignored the mandates of the AEDPA and this Court's decisions in *Renico v. Lett*, 559 U.S. – (2010); *Bell v. Cone*, 535 U.S. 685 (2002), and *Tennessee v. Street*, 471 U.S. 409 (1985). This petition presents this Court with a decision in which a federal appellate court pays mere lip service to the AEDPA and proceeds to decide the issue before it as if that issue were on direct review.

Without deference or discussion, explanation or citation, the Seventh Circuit ruled that contrary to the state court's decision that Phillips' testimony

did not contain hearsay, the "hearsay violation is beyond dispute" (A5) The court then determined that Ray's confrontation clause rights were violated when Phillips' un-objected to testimony was admitted (A6-11).

Here, the Seventh Circuit entirely failed to apply the AEDPA standard to Ray's claim. The decision affords zero deference to the state court decision at issue. In fact, the decision barely refers to the state court decision at all, choosing instead to examine the constitutional claim as if there were no deference due to the state court. Further, the Seventh Circuit decision fails to point to a single "clearly established Federal law, as determined by" this Court to which the state court decision was contrary, or of which it involved an unreasonable application. *See* 28 U.S.C. § 2254(d)(1). Instead, the Seventh Circuit substituted its judgment for the state court's judgment and granted habeas relief.

A. The Seventh Circuit exceeded its authority under 28 U.S.C. § 2254(d) when it concluded that Phillips' statements contained hearsay.

As this Court recently restated, the question in federal habeas proceedings is *not* whether the state courts erred or abused their discretion in some way. *Renico v. Lett*, 559 U.S. – (2010) (slip op. at 5). "The question under the AEDPA is instead whether the

determination of the" state court was contrary to, or an unreasonable application of, clearly established federal law. *Id.*

1. The statements were not hearsay.

"Out-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted." *Anderson v. United States*, 417 U.S. 211, 219 (1974). If a statement is not hearsay, the only bar on its admission is relevance. *Id.* at 221. When a statement is not hearsay, it raises no confrontation clause issue. *See id.* at 219-20.

Here, Phillips' statements that two of Ray's co-actors placed him at the crime scene with a gun was not introduced to prove that Ray was at the crime scene with a gun, but to show Ray's reaction to hearing that his friends had inculpated him in the crime. It was not offered as substantive evidence of Ray's guilt, but to show Ray's behavior upon learning that his friends named him as a participant in the crime. Ray had first denied knowing anything about the shooting, but when he heard that his friends placed him at the scene, he told Phillips, "[T]ell me which gun killed the girls and I'll tell you everything" (A34). Because Phillips' testimony regarding what Ray's friends said was not introduced for its truth, it was not hearsay.

Further, it does not make sense to find that the co-actors' statements were introduced for their

"truth" because the statements were inconsistent with one another. One co-actor placed Ray at the scene with a nine millimeter; the other placed him there with a .45 (A34). The statements were clearly not introduced to show that Ray was at the scene with a nine millimeter and, at the same time, a .45.[2] Instead, they were admitted to show how Ray's behavior and story changed when he was told his friends were naming names. This is a textbook example of the admission of extrajudicial statements for the limited purpose of showing the defendant's highly relevant reaction to those statements.

2. The state court properly concluded that the statements were not hearsay.

In his direct appeal, Ray argued that his confrontation clause rights were violated by the admission of hearsay statements. The State argued that Phillips' testimony was not hearsay and, consequently, did not violate Ray's confrontation clause rights. The state court of appeals found that Ray's claim was similar to the claim presented to this Court in *Tennessee v. Street*, 471 U.S. 409 (1985) (A33). Applying *Street*, the court concluded that

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[2]If one coactor had said Ray had a knife and another said Ray had a club, or one said Ray was there in a black sweatshirt and another said he was there with a green raincoat, it would be "beyond dispute" that the statements were not admitted for their truth.

because Phillips' testimony did not include out-of-court statements offered for their truth, there was no confrontation clause issue (A33-35).

3. The Seventh Circuit, without citation or deference, impermissibly decided the statements were hearsay.

In his habeas petition, Ray raised his confrontation clause claim again. The State asserted that Ray was not entitled to relief because he had not shown that the state court decision rejecting his claim was "contrary to, or an unreasonable application of," *Street* or any other clearly established law from this Court. *See* 28 U.S.C. § 2254(d)(1). Without explanation, citation or deference, the Seventh Circuit ruled that the "hearsay violation is beyond dispute" (A5). Finding that Phillips' testimony contained hearsay, the court proceeded to determine that the introduction of the statements violated Ray's confrontation clause rights (A5-10).

When a state court adjudicates a prisoner's claim on the merits, as the state court did in Ray's case, that decision is entitled to deference. *See* 28 U.S.C. §§ 2254(d)(1) and (2). The prisoner's underlying judgment of conviction is not to be disturbed unless the federal court finds that the state court decision is "contrary to, or any

unreasonable application of, clearly established Federal law, as determined by" this Court or if the decision is "based on an unreasonable determination of the facts in light of the evidence." *Id.*

The Seventh Circuit decision fails to accord the state court decision the requisite deference. The Seventh Circuit's decision fails to adhere to the demand "that state-court decisions be given the benefit of the doubt." *See Visciotti*, 537 U.S. at 24. Nor does the Seventh Circuit's decision point to one single case from this Court to which the state court decision is contrary or of which it is an unreasonable application. This failure marks a clear and improper departure from the mandates of the AEDPA. *See, e.g., Lett*, 559 U.S. – (slip op. at 5-9).

Here, the state court analyzed the facts in Ray's case and found *Street* controlling (A33-35). The state court found, as in *Street*, that the statements at issue were not hearsay so that no confrontation clause issue arose from their admission (A35). The Seventh Circuit, however, concluded that the statements were hearsay. There are two problems with the federal court's conclusion.

First, the Seventh Circuit failed to provide even a modicum of deference to the state court's finding that the testimony did not contain hearsay. The Seventh Circuit decision makes the conclusory statement that the testimony was hearsay without examining the state court's reasoning. The Seventh

Circuit stated that any conclusion contrary to its own shows "lively imagination" (A7).

Whether a state court's determination that evidence is hearsay is a question of fact, a question of law, or a mixed question, it is a determination that is due deference in a federal habeas court. 28 U.S.C. § 2254(d) and (e). The Seventh Circuit's decision wholly ignores the state court's reasoning and ruling and substitutes its own judgment for that of the state court.

Second, the Seventh Circuit decision not only ignores the state court ruling and concludes the hearsay issue is "beyond dispute," but it fails to show how the state court decision was contrary to, or an unreasonable application of, clearly established federal law. The decision points to not one case of this Court of which the state court ran afoul.

The Seventh Circuit clearly exceeded its authority in determining that Phillips' testimony contained hearsay. The Seventh Circuit must provide deference to the state court's decision that the statements were elicited not for their truth, but to demonstrate Ray's inculpatory reaction to hearing the statements. Should the Seventh Circuit find a state court decision to be contrary to, or an unreasonable application of, some clearly established federal law, it must set forth its reasoning and conclusions in its decision in order to provide the state courts guidance for future cases.

B. The Seventh Circuit exceeded its authority under 28 U.S.C. § 2254(d)(1) by failing to show how the state court's decision applying *Street* was contrary to that decision or an unreasonable application of that decision.

The Seventh Circuit described the State's argument that Phillips' testimony was not elicited for its truth as a "cleverly presented" argument and stated that such an argument "shows lively imagination" (A7). The Seventh Circuit failed, however, to show how the state court's argument is contrary to, or an unreasonable application of, clearly established Supreme Court law.

Finding *Street* controlling, the state court concluded Phillips' testimony did not include hearsay (A33-35). In *Street*, this Court rejected a petitioner's complaint that his confrontation clause rights had been violated when his non-testifying co-actor's extrajudicial statements were admitted at trial. *Street*, 471 U.S. 409 (1985). This Court concluded that the co-actor's confession – implicating the petitioner – "was *not* hearsay under traditional rules of evidence" because it was not used "to prove the truth" of the assertions in the confession. *Id.* at 413. "The *nonhearsay* aspect of [the coactor]'s confession – not to prove what happened at the crime scene but to prove what happened when respondent confessed – raises no Confrontation Clause concerns." *Id.* at 414.

The Seventh Circuit, however, found *Street* "distinguishable" from Ray's case (A7-8) Such a finding has no relevance in a case that must be analyzed under the deferential standards set forth in the AEDPA. To grant relief, the court must point to a Supreme Court case to which the state court decision was contrary or of which it was an unreasonable application. The Seventh Circuit decision did not find that the state court decision is contrary to, or an unreasonable application of, *Street*. Even if *Street* is "distinguishable," the Seventh Circuit did not show how the state court's decision applying it is "at such tension with governing Supreme Court precedents, or so inadequately supported by the record, or so arbitrary, that a writ must issue." *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997).

The Seventh Circuit's decision in this case wholly ignores the instructions of the AEDPA and the law of this Court. The Seventh Circuit far exceeded its authority in granting Ray habeas relief because it found *Street* "distinguishable." Without a finding that the state court's decision was contrary to, or an unreasonable application of, clearly established law from this Court, the Seventh Circuit had no authority to grant relief.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 08-2825

ELLIOT D. RAY,

Petitioner-Appellant

v.

ANA BOATWRIGHT,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 1:07-cv-00190-WGC-**William C. Griesbach**,
Judge

ARGUED NOVEMBER 5, 2009
DECIDED JANUARY 21, 2010
AMENDED APRIL 1, 2010

Before BAUER, MANION and WILLIAMS,
Circuit Judges.

BAUER, *Circuit Judge*. Elliot Ray appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Because it

was error for the state court to admit the co-actors' statements through the police detective's testimony at trial, violating Ray's right of confrontation, we reverse and remand.

I. BACKGROUND

Ray was one of several gunmen charged in Wisconsin state court for a retaliatory shooting in which Rita Martinez, an eleven-year-old girl, was killed, and two people were injured on 29th Street in Milwaukee, Wisconsin. Ray claims that on the night of the shooting, he changed his mind about accompanying his friends to 29th Street, told his friends that he was not going with them, and returned to his friend's house on 33rd Street. Ray maintains that he learned that Martinez had been shot near 29th Street from a television news report.

At trial, the State called Detective Daniel Phillips to testify about the homicide investigation and his interview with Ray at the police station. The detective testified about Ray's signed statement that was written toward the end of Ray's interview, where Ray talked about the night of shootings at issue, as well as the events that transpired the night before the shootings. Ray's App. at 642. In testifying, the detective primarily read from Ray's statement, including the portion where he told Ray that two of his co-actors' had made statements to implicate Ray in the shootings. We note that the detective testifying to the statements made by others is inadmissible hearsay. The detective testified as follows:

> Ray states that he too then began walking from 33rd Street to 29th Street to go shoot along with the rest of them, but Ray states when he got to North Avenue he thought "fuck it" and turned around and went back to [his friend's] house.
>
> Ray was then confronted with numerous statements made by co-actors that they were present shooting on 29th Street and so was Ray.
>
> Ray then stated "those stupid niggers shouldn't be talking and they can't talk for me."
>
> *When confronted with statements by [Miriam Myles] that Ray was shooting a nine-millimeter on 29th Street [and] in a statement by Sylvester Townsend . . . that Ray had a .45-caliber pistol[,]* Ray then said "tell me which gun killed the girl and I'll tell you everything."

Ray's App. at 653. (Emphasis added.)

Ray's attorney did not object to the detective's testimony regarding the above-referenced statements. Neither Miriam Myles nor Sylvester Townsend testified at trial.

A jury returned guilty verdicts for one count of first-degree reckless homicide, party to a crime, and two counts of first-degree recklessly endangering safety. Ray's App. at 38. He was also convicted of being a felon in possession of a firearm. *Id.*

On direct appeal, Ray raised five issues, including a claim that his confrontation clause rights

were violated when the detective was allowed to testify regarding statements made by Ray's co-actors, when those co-actors were not witnesses at trial. The state appellate court ignored this issue and solely focused on whether there was a hearsay violation, despite the detective using the phrase, "Ray was then confronted" in his testimony. The state appellate court concluded that the detective's references to the co-actors' statements were not hearsay because they were not offered to prove "the truth of the matter" contained in the statements but rather "to show Ray's reaction to his co-actors' statements placing him at the scene, shooting a gun—a reaction implicating him in the revenge-seeking conspiracy." Ray's App. at 40-42. The state supreme court denied Ray's petition for review.

Ray then sought post-conviction relief in state court under Wis. Stat. § 974.06. He was denied relief. Ray's App. at 95.

Ray filed two separate pro se petitions for writ of habeas corpus in the federal district court. The district court denied both of Ray's petitions pursuant to Rule 4 of the Rules Governing Section 2254 Cases, finding that he set forth no cognizable constitutional or federal law claims. Ray's App. at 51-58, 94-100. Thereafter, the district court granted Ray's request for a certificate of appealability to address whether the trial court's admission of the statements by non-testifying co-actors through the testimony of the detective ran afoul of the confrontation clause.

II. DISCUSSION

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), an application for a writ of habeas corpus may not be granted unless adjudication of the claim in state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "[S]tate-court judgments must be upheld unless, after the closest examination of the state-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated." *Williams v. Taylor,* 529 U.S. 362, 388 (2000).

The Government seeks to frame the issue in this case as one involving the hearsay rule; it is not. As noted above, the hearsay violation is beyond dispute. The issue, then, involves the violation of the Sixth Amendment of the Constitution which says that: "The accused shall enjoy the right . . . to be confronted with the witnesses against him. The Supreme Court has held that the guarantee, which is extended against the states by the Fourteenth Amendment, includes the right to cross-examine witnesses. *See Pointer v. Texas,* 380 U.S. 400, 404 (1965). And this fundamental constitutional right is quite properly an almost total ban on the introduction of accusations against the accused by persons not present for cross-examination.

A. Whether There Was A Confrontation Clause Issue

The first issue we must address is whether the detective's testimony concerning the statements made by the co-actors violated Ray's right of confrontation. The government contends that the co-actors' statements were used "not as substantive evidence of Ray's guilt, but instead to 'give the context of' Ray's reaction to those statements." Appellee's Brief at 22. Because the statements were not hearsay, the government maintains that they do not run afoul of the confrontation clause. *Id.* at 23. The government likens this case to both *Tennessee v. Street,* 471 U.S. 409, 417 (1985) and *Lee v. McCaughtry,* 892 F.3d 1318, 1325 (7th Cir. 1990). In *Street,* the Supreme Court held that there was no confrontation clause violation when the State introduced the co-actor's confession, because it was introduced for the non-hearsay purpose of rebutting the defendant's testimony that his own confession was a coerced "copy" of the co-actor's statement. 471 U.S. at 417. In *Lee,* we held that there was no confrontation clause violation in admitting into evidence a tape recording that included the state's attorney's narration of the accomplice's accusation in the recorded interview with the defendant, because it was used to place into context for the jury the metamorphosis of the defendant's accounts of events, i.e., that the defendant changed his story after hearing the accomplice's accusation. 892 F.3d at 1325.

The government maintains that the state court's conclusion that the co-actors' statements were

introduced to give context to Ray's reaction to them (i.e., a guilty reaction), not to show their underlying truth, is a reasonable conclusion and a reasonable application of federal law. *Id.* at 24.

We disagree. The confrontation clause has been invoked to prevent, even in a joint trial, the admission of a confession by a co-defendant that implicates the other accused, even if the trial judge provides a limiting instruction. *See Bruton v. United States,* 391 U.S. 123, 127-28 (1968). While the method of presentation of the accusations in this case shows lively imagination on the part of the prosecution, it nevertheless runs afoul of the United States Constitution. Here, the evidence presented by the prosecution delivered to the jury statements by named co-actors, not available for cross-examination, accusing Ray of the very crimes with which he stood charged. However cleverly presented, the evidence was a clear violation of Ray's constitutional right of confrontation. While the government asserts that "a number of witnesses placed Ray among the group of people involved in the shooting" (Appellee's Brief at 5-6), none of these witnesses could place Ray at the scene of the shootings, with a weapon in his hand. To accept the government's position that the statements were offered only to create the setting for Ray's response, and therefore admissible, would set the stage to eliminate, in most cases, the confrontation right "enjoyed by the accused."

Street is factually distinguishable because there, the co-actor's confession was introduced in rebuttal to refute the defendant's claim of coercion, where here, the detective testified to the co-actors'

statements during the State's case-in-chief. The court in *Street* also instructed the jury that the co-actor's statement was to "be considered by you for rebutable [sic] purposes only, and you are not to consider the truthfulness of the statement in any way whatsoever." *Id.* at 412. The court in this case issued no limiting instruction.

Lee is also distinguishable because we do not find that Ray changed his version of events after hearing the accusations of the co-actors. Further, the trial court in *Lee* also provided a limiting instruction whereas none was provided here.

We find that the detective testifying to the co-actors' statements proved far more than any reaction that Ray had during his interview. Ray did not have the opportunity to cross-examine these co-actors at trial. Accordingly, these statements violated Ray's right of confrontation.

B. Whether These Statements Were Admissible Under *Roberts* And *Lilly*

Because Ray's conviction was finalized before *Crawford v. Washington*, 541 U.S. 36 (2004), was decided, Ray's confrontation clause claim should be analyzed "according to *Roberts* and *Lilly*, the clearly established Supreme Court at the time of the state court decisions." *Bintz v. Bertrand*, 403 F.3d 859, 867 (7th Cir. 2005). Under these cases, the veracity of statements from non-testifying witnesses is sufficiently dependable to allow the untested admission of such statements against an accused at trial when (1) "the evidence falls within a firmly

rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability. *Ohio v. Roberts,* 448 U.S. 56, 65-66 (1980); *Lilly v. Virginia,* 527 U.S. 116, 124-25 (1999).

The government does not argue, nor do we find, that these statements fall within a hearsay exception.

Additionally, the government does not argue that these statements contain particularized guarantees of trust- worthiness. As this Court interprets the reasoning of the plurality in *Lilly,* these guarantees of trustworthiness "must be inherent in the circumstances of the testimony itself; the fact that other evidence corroborates the testimony in question does not suffice." *United States v. Castelan,* 219 F.3d 690, 695 (7th Cir. 2000). There is a presumption of unreliability that attaches to a co-defendant's confession, see *Lee v. Illinois,* 476 U.S. 530, 543, (1986), "[i]t is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when . . . the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing." *Lilly,* 527 U.S. at 137.

Here, the co-actor's statements neither fall "within a firmly rooted hearsay exception," nor do they contain "particularized guarantees of trustworthiness." Therefore, these statements were

inadmissible. *See Roberts,* 448 U.S. at 65-66; *Lilly,* 527 U.S. at 124-25.

C. Whether It Was Harmless Error To Admit These Statements

We have concluded that the hearsay statements were inadmissible. The state does not contend that Ray failed to exhaust his state remedies or procedurally defaulted his constitutional arguments. Accordingly, these arguments are waived. *Lilly v. Gilmore,* 988 F.2d 783, 784-85 (7th Cir. 1993). We must now determine whether the error in admitting these statements was harmless or whether it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993).

In this case, the error in admitting these statements was not harmless. Ray was not able to cross-examine the only witnesses who directly implicated him to being at the scene of the shooting with a weapon in his hand, and who directly refuted Ray's claim that he had withdrawn from the conspiracy at issue. We find this confrontation clause violation seriously affected the fairness of the judicial proceedings, resulted in a decision that was contrary to clearly established federal law, and reverse the district court's opinion.

D. Whether Ray's Petition Was Timely

The government alternatively argues that Ray's habeas petition should be barred because it was untimely. Under the rules governing AEDPA, a

petitioner has one year in which to file a petition for writ of habeas corpus, to begin running "on the date of which the judgment became final by the conclusion of direct review or expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(I)(A).

The one-year period is tolled during a properly filed post-conviction petition in state court. *See* 28 U.S.C. § 2244(d)(2). Accordingly, Ray had until September 9, 2004 in which to file his petition. The government maintains that Ray failed to provide documentation that he had originally filed his state post-conviction motion in a timely manner, and discredits Ray's assertion that the Oklahoma prison in which he was housed misplaced the timely-filed motion.

There is no evidence in the record to support the government's assertions. However, this is largely due to the fact that the district court dismissed Ray's petition on the merits before giving the government an opportunity to answer the petition and develop the record. The record currently reflects that Ray served a copy of his pro se post-conviction petition to prison officials on April 27, 2004. Ray's App. at 32, 36. Correspondence between Ray and prison officials alternatively indicate that Ray filed his motion on April 29, 2004. Ray's App. at 32, 34-35, 37. Despite the disparity in the date, these documents provide support for Ray's assertion that he filed his post-conviction petition in a timely manner. However, the government has not yet had a chance to challenge whether the documents Ray placed into the record are authentic; whether the state court petition was ever received by prison officials; whether the papers

Ray filed were sufficient under state law to petition for post-conviction relief, or whether the individual to whom Ray allegedly gave his petition was a proper prison authority. Accordingly, we remand this case to the district court so that the government may have an opportunity to develop the record on this issue. If, after the record is fully developed, Ray's petition is determined to be timely, this Court directs the district court to grant the petition for writ of habeas corpus unless the State chooses to retry Ray within 120 days.

III. CONCLUSION

For the reasons stated above, we REVERSE the district court and REMAND the case for further proceedings not inconsistent with this opinion.

In the
United States Court of Appeals
For the Seventh Circuit

No. 08-2825

ELLIOT D. RAY,

Petitioner-Appellant

v.

ANA BOATWRIGHT,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.

No. 1:07-cv-00190-WGC
William C. Griesbach, *Judge*

ARGUED NOVEMBER 5, 2009
DECIDED JANUARY 21, 2010

Before BAUER, MANION and WILLIAMS,
Circuit Judges.

BAUER, *Circuit Judge.* Elliot Ray appeals from the district court's denial of his petition for a writ of

habeas corpus under 28 U.S.C. § 2254. Because it was plain error for the state court to admit the co-actors' statements through the police detective's testimony at trial, violating Ray's right of confrontation, we reverse and remand.

I. BACKGROUND

Ray was one of several gunmen charged in Wisconsin state court for a retaliatory shooting in which Rita Martinez, an eleven-year-old girl, was killed, and two people were injured on 29th Street in Milwaukee, Wisconsin. Ray claims that on the night of the shooting, he changed his mind about accompanying his friends to 29th Street, told his friends that he was not going with them, and returned to his friend's house on 33rd Street. Ray maintains that he learned that Martinez had been shot near 29th Street from a television news report.

At trial, the State called Detective Daniel Phillips to testify about the homicide investigation and his interview with Ray at the police station. The detective testified about Ray's signed statement that was written toward the end of Ray's interview, where Ray talked about the night of shootings at issue, as well as the events that transpired the night before the shootings. Ray's App. at 642. In testifying, the detective primarily read from Ray's statement, including the portion where he told Ray that two of his co-actors' had made statements to implicate Ray in the shootings. We note that the detective testifying to the statements made by others (other than the defendant) is inadmissible hearsay. The detective testified as follows:

> Ray states that he too then began walking from 33rd Street to 29th Street to go shoot along with the rest of them, but Ray states when he got to North Avenue he thought "fuck it" and turned around and went back to [his friend's] house.
>
> Ray was then confronted with numerous statements made by co-actors that they were present shooting on 29th Street and so was Ray.

Ray then stated "those stupid niggers shouldn't be talking and they can't talk for me."

When confronted with statements by [Miriam Myles] that Ray was shooting a nine millimeter on 29th Street [and] in a statement by Sylvester Townsend . . . that Ray had a .45-caliber pistol[,] Ray then said "tell me which gun killed the girl and I'll tell you everything."

Ray's App. at 653. (Emphasis added.)

Ray's attorney did not object to the detective's testimony regarding the above-referenced statements. Neither Miriam Myles nor Sylvester Townsend testified at trial.

A jury returned guilty verdicts for one count of first-degree reckless homicide, party to a crime, and two counts of first-degree recklessly endangering safety. Ray's App. at 38. He was also convicted of being a felon in possession of a firearm. *Id.*

On direct appeal, Ray raised five issues, including a claim that his confrontation clause rights were violated when the detective was allowed to testify regarding statements made by Ray's co-actors, when those co-actors were not witnesses at trial. The state appellate court ignored this issue and solely focused on whether there was a hearsay violation, despite the detective using the phrase, "Ray was then confronted" in his testimony. The state appellate court concluded that the detective's references to the co-actors' statements were not hearsay because they were not offered to prove "the truth of the matter" contained in the statements but rather "to show Ray's reaction to his co-actors' statements placing him at the scene, shooting a gun-a reaction implicating him in the revenge-seeking conspiracy." Ray's App. at 40-42. The state supreme court denied Ray's petition for review.

Ray then sought post-conviction relief in state court under Wis. Stat. § 974.06. He was denied relief. Ray's App. at 95.

Ray filed two separate pro se petitions for writ of habeas corpus in the federal district court. The district court denied both of Ray's petitions pursuant to Rule 4 of the Rules Governing Section 2254 Cases, finding that he set forth no cognizable constitutional or federal law claims. Ray's App. at 51-58, 94-100. Thereafter, the district court granted Ray's request for a certificate of appealability to address whether the trial court's admission of the statements by non-testifying co-actors through the testimony of the detective ran afoul of the confrontation clause.

II. DISCUSSION

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), an application for a writ of habeas corpus may not be granted unless adjudication of the claim in state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "[S]tate-court judgments must be upheld unless, after the closest examination of the state-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated." *Williams v. Taylor,* 529 U.S. 362, 388 (2000).

The Government seeks to frame the issue in this case as one involving the hearsay rule; it is not. While there is a hearsay violation as noted above, the issue involves the violation of the Sixth Amendment of the Constitution which says that: "The accused shall enjoy the right . . . to be confronted with the witnesses against him The Supreme Court has held that the guarantee, which is extended against the states by the Fourteenth Amendment, includes the right to cross-examine witnesses. *See Pointer v. Texas,* 380 U.S. 400, 404 (1965). And this fundamental constitutional right is quite properly an almost total ban on the introduction of accusations against the accused by persons not present for cross-examination.

A. Whether There Was A Confrontation Clause Issue

The first issue we must address is whether the detective's testimony concerning the statements made by the co-actors violated Ray's right of confrontation. The government contends that the co-actors' statements were used "not as substantive evidence of Ray's guilt, but instead to 'give the context of' Ray's reaction to those statements." Appellee's Brief at 22. Because the statements were not hearsay, the government maintains that they do not run afoul of the confrontation clause. *Id.* at 23. The government likens this case to both *Tennessee v. Street*, 471 U.S. 409, 417 (1985) and *Lee v. McCaughtry*, 892 F.3d 1318, 1325 (7th Cir. 1990). In *Street*, the Supreme Court held that there was no confrontation clause violation when the State introduced the co-actor's confession, because it was introduced for the non-hearsay purpose of rebutting the defendant's testimony that his own confession was a coerced "copy" of the co-actor's statement. 471 U.S. at 417. In *Lee*, we held that there was no confrontation clause violation in admitting into evidence a tape recording that included the state's attorney's narration of the accomplice's accusation in the recorded interview with the defendant, because it was used to place into context for the jury the metamorphosis of the defendant's accounts of events, i.e., that the defendant changed his story after hearing the accomplice's accusation. 892 F.3d at 1325.

The government maintains that the state court's conclusion that the co-actors' statements were

introduced to give context to Ray's reaction to them (i.e., a guilty reaction), not to show their underlying truth, is a reasonable conclusion and a reasonable application of federal law. *Id.* at 24.

We disagree. The confrontation clause has been invoked to prevent, even in a joint trial, the admission of a confession by a co-defendant that implicates the other accused, even if the trial judge provides a limiting instruction. *See Bruton v. United States*, 391 U.S. 123, 127-28 (1968). While the method of presentation of the accusations in this case shows lively imagination on the part of the prosecution, it nevertheless runs afoul of the United States Constitution. Here, the evidence presented by the prosecution delivered to the jury statements by named co-actors, not available for cross-examination, accusing Ray of the very crimes with which he stood charged. However cleverly presented, the evidence was a clear violation of Ray's constitutional right of confrontation. While the government asserts that "a number of witnesses placed Ray among the group of people involved in the shooting" (Appellee's Brief at 5-6), none of these witnesses could place Ray at the scene of the shootings, with a weapon in his hand. To accept the government's position that the statements were offered only to create the setting for Ray's response, and therefore admissible, would set the stage to eliminate, in most cases, the confrontation right "enjoyed by the accused."

Street is factually distinguishable because there, the co-actors' confession was introduced in rebuttal to refute the defendant's claim of coercion, where

here, the detective testified to the co-actors' statements during the State's case-in-chief. The court in *Street* also instructed the jury that the co-actor's statement was to "be considered by you for rebutable [sic] purposes only, and you are not to consider the truthfulness of the statement in any way whatsoever." *Id.* at 512. The court in this case issued no limiting instruction.

Lee is also distinguishable because we do not find that Ray changed his version of events after hearing the accusations of the co-actors. Further, the trial court in *Lee* also provided a limiting instruction whereas none was provided here.

We find that the detective testifying to the co-actors' statements proved far more than any reaction that Ray had during his interview. Ray did not have the opportunity to cross-examine these co-actors at trial. Accordingly, these statements violated Ray's right of confrontation.

B. Whether These Statements Were Admissible Under *Roberts* And *Lilly*

Because Ray's conviction was finalized before *Crawford v. Washington*, 541 U.S. 36 (2004), was decided, Ray's confrontation clause claim should be analyzed "according *to Roberts* and *Lilly*, the clearly established Supreme Court precedent at the time of the state court decisions." *Bintz v. Bertrand*, 403 F.3d 859, 867 (7th Cir. 2005). Under these cases, the veracity of statements from non-testifying witnesses is sufficiently dependable to allow the untested admission of such statements against an

accused at trial when (1) "the evidence falls within a firmly rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability. *Ohio v. Roberts,* 448 U.S. 56, 65-66 (1980); *Lilly v. Virginia,* 527 U.S. 116, 124-25 (1999).

The government does not argue, nor do we find, that these statements fall within a hearsay exception.

Additionally, the government does not argue that these statements contain particularized guarantees of trustworthiness. As this Court interprets the reasoning of the plurality in *Lilly,* these guarantees of trustworthiness "must be inherent in the circumstances of the testimony itself; the fact that other evidence corroborates the testimony in question does not suffice." *United States v. Castelan,* 219 F.3d 690, 695 (7th Cir. 2000). There is a presumption of unreliability that attaches to a co-defendant's confession, see *Lee v. Illinois,* 476 U.S. 530, 543 (1986), "[i]t is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when . . . the government is involved in the statements' production and when the statements describe past events and have not been subjected to adversarial testing." *Lilly,* 527 U.S. at 137.

Here, the co-actor's statements neither fall "within a firmly rooted hearsay exception", nor do they contain "particularized guarantees of

trustworthiness." Therefore, these statements were inadmissible. *See Ohio v. Roberts,* 448 U.S. at 65-66; *Lilly,* 527 U.S. at 124-25.

C. Whether It Was Plain Error To Admit These Statements

Ray concedes that no objection was made when the detective testified to the co-actors' statements and that, as a consequence, our review is limited to plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Hodges,* 315 F.3d 794, 800 (7th Cir. 2003). Under the plain error standard, "we must decide (1) whether there was an error at all, (2) whether it was plain, (3) whether it affected the defendant's substantial rights, and (4) whether (if the first three factors are present) it seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Hawk*, 434 F.3d 959, 962, (7th Cir. 2006). The focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial. *Delaware v. Van Arsdall,* 475 U.S. 673, 680 (1986). A new trial is warranted if the error had a substantial and injurious effect or influence on determining the jury verdict. *Bintz,* 403 F.3d at 869.

Here, the error in admitting statements by non-testifying co-actors was plain. Ray's substantial rights were affected because he was not able to cross-examine the only witnesses who directly implicated him to being at the scene of the shooting with a weapon in his hand, and who directly refuted Ray's claim that he had withdrawn from the

conspiracy at issue. We find this confrontation clause violation seriously affected the fairness of the judicial proceedings and reverse the district court's opinion.

D. Whether Ray's Petition Was Timely

The government alternatively argues that Ray's habeas petition should be barred because it was untimely. Under the rules governing AEDPA, a petitioner has one year in which to file a petition for writ of habeas corpus, to begin running "on the date of which the judgment became final by the conclusion of direct review or expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The one-year period is tolled during a properly filed post-conviction petition in state court. *See* 28 U.S.C. § 2244(d)(2). Accordingly, Ray had until September 9, 2004 in which to file his petition. The government maintain that Ray failed to provide documentation that he had originally filed his state post-conviction motion in a timely manner, and discredits Ray's assertion that the Oklahoma prison in which he was housed misplaced the timely-filed motion.

There is no evidence in the record to support the government's assertions. However, this is largely due to the fact that the district court dismissed Ray's petition on the merits before giving the government an opportunity to answer the petition and develop the record. The record currently reflects that Ray served a copy of his pro se post-conviction petition to prison officials on April 27, 2004. Ray's App. at 32, 36. Correspondence between Ray and prison officials alternatively indicate that Ray filed his motion on

April 29, 2004. Ray's App. at 32, 34-35,37. Despite the disparity in the date, these documents provide support for Ray's assertion that he filed his post-conviction petition in a timely manner. However, the government has not yet had a chance to challenge whether the documents Ray placed into the record are authentic; whether the state court petition was ever received by prison officials; whether the papers Ray filed were sufficient under state law to petition for post-conviction relief; or whether the individual to whom Ray allegedly gave his petition was a proper prison authority. Accordingly, we remand this case to the district court so that the government may have an opportunity to develop the record on this issue. If, after the record is fully developed, Ray's petition is determined to be timely, this Court directs the district court to grant the petition for writ of habeas corpus unless the State chooses to retry Ray within 120 days.

III. CONCLUSION

For the reasons stated above, we REVERSE the district court and REMAND the case for further proceedings not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 21, 2010

Before

WILLIAM J. BAUER, *Circuit Judge*
DANIEL A. MANION, *Circuit Judge*
ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 08-2825

ELLIOT D. RAY,

Petitioner-Appellant,

v.

ANA BOATWRIGHT,

Respondent-Appellee.

Appeal from the District Court for the Eastern District of Wisconsin.

No. 1:07-cv-00190-WCG
William C. Griesbach, *Judge.*

The judgment of the Distric Court is **REVESED** and the case is **REMANDED** in accordance with the decision of this court entered on this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 1, 2010

Before

WILLIAM J. BAUER, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 08-2825

ELLIOT D. RAY,

Petitioner-Appellant,

v.

ANA BOATWRIGHT,

Respondent-Appellee.

Appeal from the District Court for the Eastern District of Wisconsin.

No. 1:07-cv-00190-WCG
William C. Griesbach, *Judge.*

AMENDED ORDER

On consideration of the petition for rehearing and rehearing *en banc* filed in the above-captioned case

by respondent-appellee on February 3, 2010, and the response filed by petitioner-appellant on February 18, 2010, no judge in active service has requested a vote on the petition for rehearing *en banc*[1] and all of the judges on the original panel have voted to deny the petition for rehearing. It is, therefore, **ORDERED** that the petition for rehearing and rehearing *en banc* is DENIED.

IT IS FURTHER ORDERED that this court's opinion dated January 21, 2010, is amended in a separately filed opinion released today.

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[1]Circuit Judge Joel M. Flaum did not participate in the consideration of this petition for rehearing.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 1, 2010

Before

WILLIAM J. BAUER, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 08-2825

ELLIOT D. RAY,

Petitioner-Appellant,

v.

ANA BOATWRIGHT,

Respondent-Appellee.

Appeal from the District Court for the Eastern District of Wisconsin.

No. 1:07-cv-00190-WCG
William C. Griesbach, *Judge.*

O R D E R

On consideration of the petition for rehearing and rehearing *en banc* filed in the above-captioned case

by respondent-appellee on February 3, 2010, and the response filed by petitioner-appellant on February 18, 2010, no judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny the petition for rehearing. It is, therefore, **ORDERED** that the petition for rehearing and rehearing *en banc* is DENIED.

IT IS FURTHER ORDERED that this court's opinion dated January 21, 2010, is amended in a separately filed opinion released today.

COURT OF APPEALS
DECISION
DATED AND FILED
January 28, 2003

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2002AP0791-CR Cir. Ct. No. 00CF1684

STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,
Plaintiff-Respondent,
V.

ELLIOT D. RAY,
Defendant-Appellant.

APPEAL from order of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Elliot D. Ray, appeals from a judgment of conviction, following his jury trial, for first-degree reckless homicide, party to a crime, two counts of first-degree recklessly endangering safety, party to a crime and possession of a firearm by felon. He argues that: (1) his confrontation rights were

violated by the admission of the statements of non-testifying co-actors; (2) the court erred in denying his mistrial motion based on the State's reference to his felony record; and (3) he was sentenced based on inaccurate information. We affirm.

I. BACKGROUND

¶2 Ray was one of several gunmen involved in a March 25, 2000 retaliation shoot-out on North 29th Street, which injured Tenifa Jones and Jermaine Savage and killed eleven-year-old Rita Martinez. Trial evidence established that on the night before the deadly shoot-out, Ray and his friends were involved in another shooting outside Alex's Tavern on 30th and Brown Streets. Ray told police that he and a group of friends exchanged gunfire with another group of men after Ray's friend, Jonathan Booth, had an altercation with a patron from the tavern. Ray testified that the next day, he and several of his friends were at Sylvester Townsend's residence discussing the incident when they decided to "'F' them niggers . . . and go down there on 29th and get them . . ." The men then gathered their guns and headed toward North Avenue. Ray testified that when he arrived at North Avenue, he "just turned around like, Fuck it, I ain't going." He noted that as he turned around, two of the other men he was with called him names, implying that he was afraid. Ray said he returned to Townsend's house and, shortly thereafter, learned from a television news report that a child had been shot in the vicinity of 29th Street.

¶3 At trial, Ray claimed that he had withdrawn from the conspiracy to seek revenge and, therefore, was not guilty. To rebut his claim, the State introduced his statement to police, in which Ray, reacting to his co-actor's statements implicating him in the shooting, offered to tell the police everything if they first told him which gun killed Martinez. The jury rejected Ray's defense and found him guilty of the charges.

II. ANALYSIS

¶4 Ray first argues that his constitutional rights were violated when a police detective, testifying at his trial, referred to confessions of non-testifying co-actors. Ray concedes that he is not entitled to have his challenge reviewed as a matter of right, given that he did not object at trial. He argues, however, that the admission of such consequential hearsay constituted plain error requiring reversal of his convictions. See WIS. STAT. § 901.03(4).[1] We disagree.

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[1]WISCONSIN STAT. § 901.03(4) (1999-2000), provides: "PLAIN ERROR. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge. A plain error is one that is both obvious and substantial or grave, and the rule is reserved for cases where there is the likelihood that the error has denied a defendant a basic constitutional right. State v. Vinson, 183 Wis. 2d 297, 303, 515 N.W.2d 314 (Ct. App. 1994).

¶5 To obtain relief under the plain error doctrine, a defendant must first establish that a constitutional error occurred at trial and that the error was clear or obvious. ***State v. Frank,*** 2002 WI App 31, ¶25, 250 Wis. 2d 95, 640 N.W.2d 198. A defendant's constitutional right to confrontation may be violated if a co-actor's confession is admitted at trial as substantive evidence of the defendant's guilt, the co-actor does not testify at trial, and the co-actor's confession is not sufficiently reliable to warrant its uncross-examined admission into evidence against the defendant. ***Lee v. Illinois,*** 476 U.S. 530, 539-46 (1986). No violation occurs, however, if the co-actor's statement was not introduced as substantive evidence to prove the truth of the co-actor's assertions. ***Tennessee v. Street,*** 471 U.S. 409, 413-14 (1985). Further, an out-of-court statement is hearsay only if it is offered to show the truth of the matters asserted in the statement. *See* WIS. STAT. § 908.01(3) (1999-2000) ("'Hearsay' is a statement, other than one made by the declarant while testifying . . . offered in evidence to prove the truth of the matter asserted.").[2] If the statement is offered only to prove that the statement was made, a confrontation issue does not arise. *See State v.* ***Curbello-Rodriguez,*** 119 Wis. 2d 414, 426-27, 430, 351 N.W.2d 758 (Ct. App. 1984). A statement is not hearsay, and does not implicate the Confrontation Clause, if it is offered, not for its truth, but to explain the prior, concurrent or

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[2]All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

subsequent conduct of another person. *See* ***id.*** at 430; *see also* ***State v. Adams,*** 221 Wis. 2d 1, 14-15, 584 N.W.2d 695 (Ct. App. 1998).

¶6 The State elicited testimony from Detective Daniel Phillips who related Ray's entire statement, including those portions in which he responded to what Phillips told him were two of his co-conspirators' statements implicating him in the shooting. Detective Phillips testified that, during the police interview, Ray said he took a gun and started walking toward 29th Street with the others to shoot at a rival group, but that he turned back before they reached their destination; that he was not present and did not participate when the shoot-out occurred. Detective Phillips then read Ray's statement:

> Ray was then confronted with numerous statements made by co-actors that they were present [at the] shooting on 29th Street and so was Ray.
>
> Ray then stated "those stupid niggers shouldn't be talking and they can't talk for me."
>
> When confronted with statements by Black (Miriam Myles, black male, 5/7/80) that Ray was shooting nine-millimeter on 29th Street in a statement by Sylvester Townsend, black male 9/20/73, that Ray had a .45-caliber pistol[,] Ray then said "tell me which gun killed the girls and I'll tell you everything."

> When told by detectives that this information could not be given to him at this time, Ray said he was afraid of "fucking himself" and Ray said he needed some time to think and then would talk to the detectives again.

¶7 Ray maintains that the inclusion of his co-actors' statements constituted plain error. We disagree. Here, the detective's references to the co-actors' statements were not offered to prove the "truth of the matter" contained in the statements, *see* WIS. STAT. § 908.01(3), but rather, to show Ray's reaction to his co-actors' statements placing him at the scene, shooting a gun—a reaction implicating him in the revenge-seeking conspiracy. Clearly, therefore, the statements were not hearsay and Ray is not entitled to reversal based on plain error.

¶8 Ray next argues that the court erred in denying his motion for a mistrial after the State inadvertently referred to him as a felon in possession of a firearm during its closing argument. We disagree.

¶9 The decision to declare a mistrial is within the sound discretion of the trial court. ***State v. Copening***, 100 Wis. 2d 700, 710, 303 N.W.2d 821 (1981). Our review is limited to whether the trial court erroneously exercised discretion in refusing to declare a mistrial. ***State v. Pankow***, 144 Wis. 2nd 23, 47, 422 N.W.2d 913 (Ct. App. 1988). A trial court properly exercises discretion when it examines the relevant facts, applies the proper standard of law,

and engages in a rational decision-making process. ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 656, 511 N.W.2d 879 (1994). A misstatement in a prosecutor's closing argument does not justify relief unless the misstatement, viewed in the context of the entire case, so infected the trial with unfairness that the defendant was denied the right to a fair trial. ***State v. Wolff***, 171 Wis. 2d 161, 166-68, 491 N.W.2d 498 (Ct. App. 1992).

¶10 Prior to trial, the parties agreed that the State would refer to Ray as a "prohibited person," rather than a "felon," for purposes of prosecuting the felon-in-possession-of-firearm charge. Ray stipulated to the status element of the offense and, pursuant to the parties' agreement, the jury was instructed: "The defendant had been prohibited from possessing a firearm on March 24, 2000. The parties have agreed that the defendant was prohibited from possessing a firearm on March 24, 2000, and you must accept this as conclusively proven."

¶11 During closing arguments, the prosecutor, explaining his perception of Ray's trial strategy, stated that Ray was trying to establish that the police were "pin[ning] this on [him]" and that, as part of his strategy, Ray was admitting to possession a gun, hoping that the jury would compromise and convict him of that charge but not the others. While commenting on this strategy the prosecutor misspoke, stating: "[I]t's a good strategy. It's a good bill of goods, if you will, to admit to that felon in possession – the prohibited person in possession of a firearm charge." The defense immediately requested a sidebar and subsequently requested a mistrial.

Denying Ray's request, the court commented that it was not even sure the jurors had heard the slip-of-the-tongue, and concluded that any error was insignificant in light of the entire proceeding. We agree.

¶12 Even if the jury did hear the comment, the content of the slip was inconsequential. Ray's trial lasted several days. The prosecutor's inadvertent use of "felon" instead of "prohibited person," which was immediately corrected, consisted of one word in a lengthy closing argument. It involved the one crime for which Ray admitted guilt.

¶13 Moreover, notwithstanding the stipulation, a defendant's felony status may be revealed to the jury. *See* ***State v. Nicholson***, 160 Wis. 2d 803, 807, 467 N.W.2d 139 (Ct. App. 1991) (It is not reversible error for the "trial court to permit the revelation to the jury of the defendant's felon status. Reversible error would only arise when the nature of that felony were revealed to the jury despite the offer to stipulate.") Indeed, under the jury instructions, the jury is informed that "the parties have agreed that the defendant was convicted of a felony. . . ." WIS JI-CRIMINAL 1342 (2000). The trial court did not err in denying Ray's request for a mistrial.

¶14 Finally, Ray argues that he was sentenced base on inaccurate information – that all the other witnesses and defendants placed him at the scene as one of the shooters. We need not address the merits of his argument, however, because Ray failed to move the trial court for resentencing. *See* ***State v. Chambers***, 173 Wis. 2d 237, 261, 496 N.W.2d 191

(Ct. App. 1989) (This court will not review a sentence on appeal if the defendant failed to move for sentence modification under WIS. STATE. RULE 809.30).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.